

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





74-1350

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

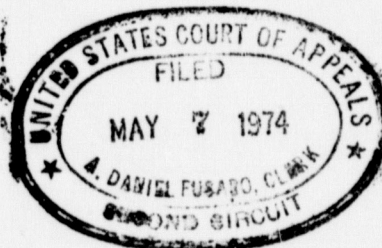
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: UNITED STATES OF AMERICA, :  
: :  
: Appellee, :  
: :  
: -against- : Docket No. 74-1350  
: :  
: ANTHONY BERNARDEZ, :  
: :  
: Appellant. :  
: :  
-----X

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. CALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
FEDERAL DEFENDER SERVICES UNIT  
606 United States Court House  
Foley Square  
New York, New York 10007

WILLIAM EPSTEIN  
Of Counsel



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## CRIMINAL DOCKET

72CR1334

NEAHER, J.

## TITLE OF CASE

THE UNITED STATES

vs.

\* JOHN JOSEPH PASTORE,  
 X RICHARD MARCO, JR.,  
 X FRANK VINCENT FELLUMERO,  
 X WILLIAM MICHAEL FARUOLO,  
 X ANTHONY BERNARDEZ,  
 X VINCENT DI MODICA,  
 X LESTER BENJAMIN SELLITTI and  
 X JOSEPH EDWARD BRUNS

## ATTORNEYS

For U. S.:

For Defendant: Sellitti-5000  
 Rabin- 186 Joralemon St.  
 B"oklyn N.Y. UL5- 1111

Theft from interstate shipment. Conspiracy to commit offense or to defraud the U.S.

## ABSTRACT OF COSTS

## AMOUNT

## CASH RECEIVED AND DISBURSED

## DATE

## NAME

## RECEIVED

## DISBURSED

Fine,

Clerk,

Marshal,

Attorney,

Commissioner's Court,

Witnesses,

3-12-72  
 3-12-72  
 3/12/72  
 3-12-72  
 3-12-72

## DATE

## PROCEEDINGS

/19/72 Before JUDD, J.- Indictment filed.  
 /29/72 Petition for Writ of Habeas Corpus Ad Prosequendum filed.  
 /29/72 Writ issued returnable 1/8/73. (By NEAHER, J.)  
 /8/73 Before NEAHER, J.-Case called- Defts and counsel present-Defts arraigned and each enters a plea of not guilty-Court enters a plea of not guilty on behalf of Anthony Bernardez and John Joseph Pastore and Vincent Di Modica-Bail cont'd as to each deft.  
 /8/73 Notice of Appearance filed (atty for Richard Marco ,Jr.)  
 /8/73 Notice of Appearance filed (atty for FRANK FELLUMERO)  
 /8/73 Notice of Appearance filed (atty for WILLIAM M. FARUOLO)  
 /8/73 Notice of Appearance filed (atty for JOSEPH EDWARD BRUNS)  
 /9/73 By NEAHER, J.- Order filed, appointing counsel. ONLY COPY AVAILABLE

72CR1334

DATE	PROCEEDINGS
1/10/73	Notice of Readiness for Trial filed.
1/10/73	Writ ret'd and filed./Executed. (Pastore).
1/24/73	Notice to Suppress filed. (Judge to set date)
1/31/73	Notice of Motion for Bill of Particulars filed, ret. 2/26/73
2/26/73	Before NEAHER, J. - Case called- Deft present without counsel-Adj'd to 3/5/73 at 10:00 A.M. (RICHARD MARCO, JR.)
3-5-73	Before NEAHER, J - Case called - adj'd without date.(deft motion to suppress evidence (Bernandez )
3-5-73	Before NEAHER, J - Case called - defts motion for Bill of Particulars adj'd without date (MARCO, JR)
3/14/73	Petition for Writ of Habeas Corpus Ad Prosequendum filed (PASTORE)
3/20/73	Writ ret'd and filed. Executed. (PASTORE)
5-7-73	Petition for Writ of Habeas Corpus Ad Prosequendum filed (Pastore)
5-7-73	By Neaheer, J Writ Issued, ret. May 11, 1973 (Pastore)
5/11/73	Before NEAHER J.- Case called- Defts and counsel present-Motion for Bill of Particulars -Motion argued-Motion granted as indicated-Pre-trial conference held and concluded-Hearing set down for June 1, 1973
5-15-73	Writ ret'd and filed - Executed (JOHN JOSEPH PASTORE)
5-21-73	Govts Bill of Particulars and Memorandum of Law filed. (on behalf of def MARCO JR. FARUOLO, BERNARDEZ & BRUNS)
5-30-73	Notice of Appearance filed (PASTORE)
6/1/73	Before NEAHER, J.E - Case called- Defts F. FELUMERO and LESTER present with counsel-A. BENARDOS present with counsel- Adj'd to 6/15/73 to set a date for trial
6/1/73	Notice of Appearance filed. (deft MARCO, JR.)
6/1-73	Notice of appearance filed (PASTORE)
6/8/73	Notice of Motion filed for Dismissal for failure to provide deft RICHARD MARCO with Bill of Particulars , ret. 6/15/73.
6/15/73	By NEAHER, J.- Order filed, deny'g for reasons indicated on the record (motion for dismissal)
6/15/73	Before NEAHER, J.- Case called- Deft and counsel present-Motion for dismissal denied-Order signed (DEFT MARCO, JR.) -Other defts set down for trial for 8/10, 1973-Bench Warrant ordered for Vincent Di Modica-Execution stayed 1 week-Bench Warrant vacated.
9/5/73	Petition for writ of Habeas Corpus ad Prosequendum filed
9/5/73	By NEAHER, J.- Writ issued, ret. 9/10/73 (PASTORE)
9-10-73	Before NEAHER, J - Case called - adj'd to Nov. 1, 1973 for Trial.
9-24-73	Writ ret'd and filed - Executed (John Joseph Pastore)
10/26/73	Petition of Writ of Habeas Corpus Ad Prosequendum filed (A. BERNANDEZ)
10/26/73	By NEAHER, J.- Writ issued, ret. 11/1/73.



DATE	PROCEEDINGS
11/1/73	Notice of appearance filed(SELLITTI)
11-1-73	Before NEAHER, J - Case called - hearing ordered and begun - Motion to suppress - defts present with counsels - Hearing held and continued to Nov. 2, 1973.
11-2-73	Before NEAHER, J - Case called - Hearing resumed - Motion argued - Decision reserved - hearing held and contd to 11-5-73.
11-5-73	Before NEAHER, J - Case called - Hearing resumed - motion to suppress denied - <del>xxxx</del> Findings to be read into the record - Wade Hearing as to deft Pastore ordered and begun - hearing held and concluded.
11-7-73	Before NEAHER, J - Case called - defts & counsels present - defts stipulate to a trial without Jury - adjd to Nov. 12, 1973 at 10:30 am - deft PASTORE arraigned and after being advised of his rights and on his own behalf withdraws plea of not guilty and enters a plea of guilty to count 2- sentence adjd without date - deft PASTORE in custody.
11-12-73	Before NEAHER, J.- Case called- Defts and counsel present- Defts Marco, Felumero, Faruolo. Bernandez, DeModica, Sellitti and Bruns each, after being advised of their rights by the court and on their own behalf withdraws their pleas of not guilty and each deft enter a plea of guilty to count 2 of the indictment- while reserving the right to appeal the suppression hearing with the consent of the U. Attorney- Sentence adjd without date- Bail contd as to each deft except deft Bernardez who is contd in custody
11-13-73	Stenographers Transcript dated 11-7-73 filed
11-13-73	Voucher for expert services filed (PASTORE)
11-13-73	Voucher for expert services filed (FELUMERO)
11-14-73	By NEAHER, J - Memorandum filed the court finds that irrespective of the validity of the consent , the statements were made voluntarily(deft Faruolo). They were preceded by warnings of Faruolo's Miranda rights for the second time, made in the absence of any actual or implied coercion. A substantial period of time intervened betweenx deft Faruolo's consent to search and his consent <del>into</del> answer questions, etc. Aside from the claimed residuary effects of the gun, there is no basis for challenging the admission of Faruolo's statements. They were voluntarily made after complete Miranda warnings , which he clearly understood.

DATE	PROCEEDINGS
2-7-74	Stenographers transcript filed dated Nov. 12, 1973.
3-5-74	Petition for writ of habeas corpus ad prosequendum filed (BERNARDEZ)
3-5-74	By NEAHER, J. - Writ issued - ret. 3-8-74 (BERNARDEZ)
3-8-74	Before NEAHER, J - all defts present with counsels - defts <u>SELLITTI</u> .
	<u>DE MODICA &amp; FRANK FELUMERO</u> sentenced to one years imprisonment on
	count 2 - Execution of sentence is suspended and deft is placed on
	probation for 3 years. Imposition of sentence is suspended on count 2
	as to defts <u>BERNARDEZ &amp; BRUNS</u> and each deft is placed on probation for
	a period of 3 years. deft BERNARDEZ probation is to follow upon his
	release from State prison. Deft <u>MARCO</u> is sentenced to 2 years imprison-
	ment on count 2 - execution of sentence is suspended and the deft is
	placed on 3 years probation. Deft <u>PASTORE</u> sentenced to 3 years imprison-
	ment on count 2 pursuant to 18:3651 - deft to serve 6 months to run
	concurrently with present Federal sentence - balance of sentence is
	suspended and the deft is placed on probation for 3 years. Imposition
	of sentence is suspended as to deft <u>FARUOLO</u> on count 2 and the deft is
	placed on probation for 5 years. - special condition requires deft to
	seek business counseling under the supervision of the probation dept.
	bail contd pending appeal.
3-8-74	Judgment & Commitments filed for all - defts - certified copies to
	Marshal.
3-12-74	Notice of Appeal filed (FARUOLO)
3-12-74	Notice of Appeal filed (BERNARDEZ) without fee (Legal Aid)
3-12-74	Docket entries and duplicate of Notices of Appeal mailed to C of A
	for defts BERNARDEZ & FARUOLO.
3-13-74	Certified copy of Judgment & Commitment retd and filed - deft Pastore
	delivered to Federal Det. Headquarters, NYC
3-13-74	Writ retd and filed - Executed (BERNARDEZ)
3-18-74	Notice of Appeal filed (BRUNS)
3-18-74	Docket entries and duplicate of Notice mailed to C of A) (BRUNS)
3-26-74	two stenographic transcripts filed (pgs 212 to 408a)
3-27-74	Order received from Court of Appeals that record be docketed on or before
	4-5-74 (FARUOLO)
3-28-74	Order received from Court of Appeals that record be docketed on or before
	4-5-74 (BRUNS)
3-28-74	Magistrate's file 72 M 1615 inserted into CR file.





125,049  
UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

FILED  
IN CLERK'S OFFICE  
U. S. DISTRICT COURT E.D. N.Y.

UNITED STATES OF AMERICA ★ DEC 19 1972 ★

- against -

JOHN JOSEPH PASTORE,  
RICHARD MARCO, JR.,  
FRANK VINCENT FELUMERO,  
WILLIAM MICHAEL FARUOLO,  
ANTHONY BERNARDEZ,  
VINCENT DI MODICA  
LESTER BENJAMIN SELLITTI and  
JOSEPH EDWARD BRUNS,

TIME A.M. ....  
P.M. ....

INDICTMENT

Crim. No.  
(T. 18, U.S.C., §371, §659  
and §2)

Defendants.

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THE GRAND JURY CHARGES:

72 CR 1334

COUNT ONE

On or about the 14th day of August 1972, within the Eastern District of New York, the defendant JOHN JOSEPH PASTORE, the defendant RICHARD MARCO, JR., the defendant FRANK VINCENT FELUMERO, the defendant WILLIAM MICHAEL FARUOLO, the defendant ANTHONY BERNARDEZ, the defendant VINCENT DI MODICA, the defendant LESTER BENJAMIN SELLITTI and the defendant JOSEPH EDWARD BRUNS did wilfully and unlawfully receive and have in their possession a quantity of packs and cartons of women's wearing apparel, having a value in excess of One Hundred Dollars (\$100.00), which goods had been stolen from a motortruck while moving as a part of and constituting an interstate shipment of freight from various points in Pennsylvania to New York, New York, the defendant JOHN JOSEPH PASTORE, the defendant RICHARD MARCO, JR., the defendant FRANK VINCENT FELUMERO, the defendant WILLIAM MICHAEL FARUOLO, the defendant ANTHONY BERNARDEZ, the defendant VINCENT DI MODICA, the defendant LESTER BENJAMIN SELLITTI and the defendant JOSEPH EDWARD BRUNS knowing the same to have been stolen. (Title 18, United States Code, Section 659 and Section 2)



COUNT TWO

On or about and between the 10th day of August 1972 and the 14th day of August 1972, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant JOHN JOSEPH PASTORE, the defendant RICHARD MARCO, JR., the defendant FRANK VINCENT FELUMERO, the defendant WILLIAM MICHAEL FARUOLO, the defendant ANTHONY BERNARDEZ, the defendant VINCENT DI MODICA, the defendant LESTER BENJAMIN SELLITTI and the defendant JOSEPH EDWARD BRUNS did wilfully combine and conspire to commit an offense against the United States in violation of Title 18, United States Code, Section 659, by conspiring to receive and have in their possession a quantity of packs and cartons of women's wearing apparel, having a value in excess of One Hundred Dollars (\$100.00), which goods were stolen from a motortruck while moving as and constituting an interstate shipment of freight from various points in Pennsylvania to New York, New York, the defendants then knowing that the said goods had been stolen.

In furtherance of said unlawful conspiracy and to further the objectives thereof, the defendant JOHN JOSEPH PASTORE, the defendant RICHARD MARCO, JR., the defendant FRANK VINCENT FELUMERO, the defendant WILLIAM MICHAEL FARUOLO, the defendant ANTHONY BERNARDEZ, the defendant VINCENT DI MODICA, the defendant LESTER BENJAMIN SELLITTI and the defendant JOSEPH EDWARD BRUNS committed the following:

O V E R T   A C T S

1. On or about August 14, 1972, at Staten Island, within the Eastern District of New York, the defendant LESTER BENJAMIN SELLITTI drove an automobile.

2. On or about August 14, 1972, within the Eastern District of New York, the defendant RICHARD MARCO, JR., the defendant WILLIAM MICHAEL FARUOLO, the defendant VINCENT DI MODICA

and the defendant LESTER BENJAMIN SELLITTI unloaded cartons and boxes of goods from a truck in the vicinity of premises located at 14 LaSalle Street, Staten Island.

3. On or about August 14, 1972, at Staten Island, within the Eastern District of New York, the defendant RICHARD MARCO, JR., drove a truck.

4. On or about August 14, 1972, within the Eastern District of New York, the defendant LESTER BENJAMIN SELLITTI, the defendant RICHARD MARCO, JR., the defendant VINCENT DI MODICA and the defendant JOHN JOSEPH PASTORE met together at the Country Club Diner in Staten Island.

5. On or about August 14, 1972, at Staten Island, within the Eastern District of New York, the defendant JOHN JOSEPH PASTORE drove an automobile.

6. On or about August 14, 1972, within the Eastern District of New York, the defendant FRANK VINCENT FELUMERO, the defendant ANTHONY BERNARDEZ and the defendant JOSEPH EDWARD BRUNS unloaded goods from a truck in the vicinity of premises located at 14 LaSalle Street, Staten Island. (Title 18, United States Code, Section 371)

A TRUE BILL.

*James P. Langdon*  
FOREMAN

*Robert A. Morse / Joseph D. Beckman Jr.*  
UNITED STATES ATTORNEY  
EASTERN DISTRICT OF NEW YORK



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2 a half-hour, but one co-counsel is representing  
3 her defendant.

4 MR. WASHOR: The same is true with Mr. Schacher

5 THE COURT: I know about that, all right.

6 As I indicated this morning, at the time  
7 I made my ruling on the suppression motion of  
8 the defendant Faruolo, which had been enjoined  
9 in by other defendants, I am prepared to read  
10 into the record the basic findings and reasons  
11 which prompted me to reach that decision.

12 As I understood the defendant, Faruolo's,  
13 tack on the legality of the search of his home,  
14 it basically emphasized two main points:

15 One, that he received inadequate warnings  
16 prior to granting any consent;

17 Two, that such consent was given under  
18 coercion, or as submission to authority,

19 The Court, on the basis of the eviden-  
20 tiary hearing, makes the following principal  
21 findings of fact:

22 One, the events in question all occurred  
23 out of doors in Faruolo's back yard in full  
24 daylight.

25 Two, agent Edwards in proceeding to

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2 Faruolo's back yard had a gun drawn.

3 Three, Edwards reholstered the gun upon  
4 the arrival of Agent Egan.

5 Four, the gun remained out in the open  
6 for several minutes -- in any event, no more  
7 than five minutes.

8 Five, prior to Egan's arrival, Edwards  
9 arrested Faruolo.

10 Six, upon placing Faruolo under arrest,  
11 Edwards advised him of his rights under Miranda  
12 against Arizona, with the exception of a warning  
13 that he had the right to have counsel appointed  
14 for him if he could not afford counsel.

15 Seven, there is no evidence that Faruolo  
16 at any time prior to these proceedings could  
17 not afford counsel of his choice.

18 Eight, Egan, shortly after Faruolo's  
19 arrest, came to the back yard and informed  
20 Faruolo that he was an FBI agent investigating  
21 a hijacking, and asked Faruolo for permission  
22 to search his house.

23 Nine, Egan further advised Faruolo that  
24 he did not have to permit a search of the house  
25 if he did not want to, and that the house would



1  
2 not be searched without his consent.

3 Ten, Egan further stated that if Faruolo  
4 did not consent to a search, a search warrant  
5 would be applied for, and he conveyed to Faruolo  
6 the belief that a warrant would be obtained.

7 Eleven, he then stated that a warrant  
8 would probably not be obtained until the follow-  
9 ing morning, and that, consequently, the FBI  
10 would keep his house under surveillance to  
11 prevent the removal of any contents therefrom.

12 Twelve, Egan did not state that Faruolo's  
13 wife or son would be prevented from leaving  
14 the house in such a case. Nor did he, or any  
15 other agent, threaten that either wife or son  
16 would or could be arrested. The Court dis-  
17 believes Faruolo's statements and inferences  
18 to the contrary.

19 Thirteen, Egan also read a written con-  
20 sent to search form to Faruolo.

21 Fourteen, Faruolo signed the consent  
22 form after thinking for a minute or two.

23 Fifteen, during the events in the back  
24 yard, three FBI agents, Egan, Edwards and  
25 Andrews, were present.

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2 Sixteen, Faruolo made no comment during  
3 the events in the back yard, other than giving  
4 his name, admitted ownership of the house,  
5 identifying his son, who stepped out of the  
6 back yard for a brief period, and indicating  
7 that he would consent to the search.

8 Seventeen, in particular, after being  
9 advised of rights to counsel and of his right  
10 to refuse permission for a search, Faruolo made  
11 no objection, asked no questions or in any  
12 other way indicated lack of understanding of  
13 his situation, or opposition to a search.

14 Eighteen, there is no claim or evidence,  
15 that at any time other than the gun incident,  
16 that Faruolo was physically coerced, restrained  
17 or threatened.

18 Nineteen, at no time prior to giving  
19 consent to the search, were any statements  
20 made by the agents which threatened or could  
21 have been viewed as threatening to Faruolo's  
22 wife or son.

23 Twenty, Faruolo, at the time of his  
24 arrest, evidenced a state of mind or disbelief  
25 or shame, rather than fear.



Twenty-one, Faruolo, prior to granting consent, had no cause to be in apprehension for his own safety or that of his family. The Court does not believe that Faruolo was "scared," and finds him to have been no more anxious than any other person placed under arrest while in the act of committing what was charged to be criminal activities.

Now, with respect to the admitted failure of Agent Edwards in advising Faruolo of his Miranda rights, to include a statement as to his right to having counsel appointed for him, as invalidating his consent to search, the Court notes the following:

A, There is some ambiguity in the decisions of this Circuit, whether the failure to warn a person of this right renders a confession inadmissible.

In United States against Carneglia,  
468 F. 2nd, 1084, Second Circuit, 1972, the  
Court held admissible a confession where a  
defendant had received an inaccurate warning  
about the right to appointment of counsel.

In so doing, the Court distinguished two

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2 cases where such a warning had been totally  
3 absent:

4 United States against Fox, 403 F.2nd, 97;  
5 United States against Chaplin, 435 F. 2nd,  
6 320. Both are Second Circuit cases.

7 However, in Fox, the warnings were  
8 deficient in two other respects. See 403 F. 2nd  
9 at 100.

10 And in Chaplin, where Miranda was being  
11 applied to a pre-Miranda arrest, the Court said  
12 that in such situations it would look into the  
13 financial resources of a defendant.

14 While this arrest postdated Miranda, and  
15 while Miranda indicated that the applicability  
16 of the rights announced therein were not to be  
17 judged by the subjective needs of an individual  
18 defendant where, as here, the absent Miranda  
19 warning is waived in a fourth, not a fifth  
20 and/or sixth amendment context, it is highly  
21 likely that an approach such as that adopted  
22 in Chaplin would be followed.

23 And of course, Faruolo has apparently  
24 never needed the appointment of counsel, by  
25 the Court.



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3 B, Faruolo has cited no case holding  
4 that Miranda warnings must be given prior to a  
5 valid consent to search. He has cited United  
6 States against Goosbey, a Sixth Circuit case,  
7 1970.

8 (continued on following page)  
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2 THE COURT: In that case, the question before  
3 the Court was whether a person, having been given  
4 his Miranda warnings, he also be given warnings as  
5 to his Fourth Amendment rights. But the Court never  
6 stated that Miranda warnings need have been given.

7 And further, it rejected the contention that  
8 Fourth Amendment warnings must be given.

9 However, the Court can appreciate the contention  
10 that a consent to a search and resulting findings may  
11 be equated to a concession and governed by the  
12 standards enunciated in Miranda.

13 On the other hand, it is possible to argue  
14 that a consent to a search is governed solely by  
15 Fourth Amendment requirements and not the Fifth and  
16 Sixth Amendment requirements under Miranda.

17 C, as to Fourth Amendment warnings, this  
18 Circuit in United States against Mapp 476 F 2d,  
19 67, in discussing and rejecting the voluntariness  
20 of a consent to a search refused to break a rule  
21 that a search is per se invalid unless it is  
22 preceded by warnings as to Fourth Amendment rights,  
23 and stated: "The Courts are competent to determine  
24 whether consent has been given, absent such warnings."

25 D, the reasoning of Mapp leads this Court to



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2 conclude that the failure to give the warning in  
3 question must be viewed under the general standard  
4 of the totality of the circumstances.

5 The Court believes that Faruolo, having  
6 essentially received his basic Miranda warnings,  
7 as well as specific Fourth Amendment warnings,  
8 received adequate warnings to uphold a consent  
9 otherwise voluntarily given.

10 See United States against Mapp, supra  
11 at 78; Gorman against the United States, 380 F 2d  
12 158, 163, a First Circuit case, 1967.

13 Faruolo's second and principal contention,  
14 is that his consent was the result of expressed  
15 or implied coercion, or a submission to authority.

16 He relies on the following premises:

17 1, that Agent Edwards, in the course of  
18 arresting him, had drawn a gun, which remained in  
19 the open.

20 2, the fact that he was under arrest at the  
21 time of his consent.

22 3, an unproven assertion, which this Court  
23 has rejected, that certain statements were made,  
24 which Faruolo viewed as threatening to his wife and  
25 17 year old son, then present in the house.

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2 Four, that Agent Egan stated that they would  
3 obtain a search warrant the following morning.

4 In determining whether there has been a  
5 consent to a search, the Court must generally answer  
6 two principal questions:

7 One, was consent actually given?

8 Two, if so, was it freely given?

9 Here, there is no dispute as to the first  
10 question. Thus the Court rejects the relevancy of  
11 Channel against United States, 285 F 2d 217, a  
12 Ninth Circuit case, 1960; Catalanotte against the  
13 United States, 208 F 2d, 264, a Sixth Circuit case,  
14 1953; Higgins against the United States, 209 F 2d,  
15 819; and Johnson against the United States, 333US  
16 10, all cited by Faruolo.

17 The Court also rejects the applicability of  
18 the other cases cited by Faruolo:

19 Waldron against the United States 219 F 2d  
20 37, DC Circuit 1955.

21 United States against Arrington, 217 F 2d  
22 630, a Seventh Circuit case, 1954.

23 Judd against the United States, 190 F 2d 649,  
24 District of Columbia Circuit, 1951.

25 United States against McCann, 40 F 2d 295,  
Southern District of New York, 1930.



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2 These cases involved egregious circumstances,  
3 in which a search was permitted as a result of threats,  
4 or in response to an effective command by authority,  
5 and/or in connection with an illegal arrest.

6 The Court stresses again that in determining  
7 the issue of voluntariness, it must assess the totality  
8 of the circumstances.

9 Schneckloth against Bustamonte, 412 US 218,  
10 226, 227, 248-49.

11 A voluntary consent cannot be the product of  
12 duress or coercion, express or implied. Schneckloth,  
13 supra at 227.

14 Absent a warrant, the Government assumes the  
15 burden of persuasion that one of the narrow exceptions  
16 to the Fourth Amendment applies to this case. United  
17 States against Mapp supra F 76.

18 The government must show that consent was given  
19 by clear and convincing evidence.

20 Arrest carries its own aura of coercion and  
21 the burden upon the government to show voluntary consent  
22 is "particularly heavy."

23 United States against Mapp supra at 78.

24 Gorman against United States, 380 F 2d 158,  
25 163, a First Circuit case in 1967.

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3 However, the mere fact that a suspect is under  
4 arrest, does not negate the possibility of a voluntary  
5 consent.

6 United States ex rel. Lundergan against McMann,  
7 417 F 2d 519, 521, a Second Circuit case; United States  
8 against Smith, 308 F 2d 657, 653, a Second Circuit  
9 case, 1962.

10 Neither does the suspect's knowledge that the  
11 search will almost certainly demonstrate his guilt.

12 United States ex rel Lundergan, supra; United  
13 States V. Gorman 355 F 2d 151, 158-159, a Second  
14 Circuit 1965 case.

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(Continued on next page.)



MP/td  
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The Court, on the basis of the findings previously noted, has found two other possible grounds supporting Faruolo's position:

One, a drawn gun at the time of his arrest.

Two, Agent Egan's statement that a warrant could be obtained anyway.

In United States against Rothberg, 460 F 2d 223, the Second Circuit upheld a consent search in circumstances far more compelling than here.

With respect to Agent Egan's statement about securing a warrant, the Court believes that there was sufficient basis for him to believe that a warrant could be obtained. He was not engaging in deceit or trickery.

There was, in fact, sufficient basis for obtaining a warrant. The Court sees no reason to review the evidence adduced at the hearing; the Court's own conclusion is based in large part, but not exclusively, on the information supplied by the two informants, the fact that Pastore had been personally arrested by Agent Egan on prior hijacking charges, as well as the amount of corroborative evidence independently obtained in the course of surveillance, and in particular, the eyewitnessing of movements of

1  
2 cartons and presence of garments, at the La Salle  
3 Street house owned by Faruolo. These satisfied  
4 the Court that a prudent man would well have  
5 warranted in believing that Faruolo and others there  
6 were involved in the Agents' presence in activities  
7 relating to the possession of goods that had been  
8 hijacked.

9 See Gatterdam against the United States, 5 F.  
10 2d 673, 674, a Sixth Circuit 1925 case, upholding  
11 a search, assuming arguendo that an officer had made  
12 a statement similar to that it was claimed Agent  
13 Egan had made here.

14 Parenthetically, the Court should note that  
15 the parties, while at times indicating that possible  
16 cause relating to the legality of Faruolo's arrest  
17 was in question in this hearing, have not really  
18 addressed themselves to this question, except insofar  
19 as probably cause underlies Agent Egan's statement.

20 A review of the recent decisions in this  
21 Circuit, which counsel for Faruolo has studiously  
22 avoided, clearly indicates that the consent here in  
23 controversy was voluntarily given.

24 The circumstances here bear a striking resem-  
25 blance to those present in United States against



1  
2 Jordan, 399 F 2d, 610, a Second Circuit case, 1968,  
3 in which the Court found a consent voluntary.

4 In this case, Faruolo was advised of his  
5 right to counsel, advised of his right to refuse  
6 to consent to the search, advised that the search  
7 would not be made without consent, and read the  
8 consent to search form in full. He was not coerced,  
9 threatened or intimidated. The drawn gun had no  
10 lasting effect. There is no basis for concluding  
11 that he submitted to the authority of these FBI  
12 Agents. He was not in a location instinct with  
13 coercion being out of doors in his back yard.  
14 Compare United States against Ruiz-Estrella, 481 F 2d  
15 723, a Second Circuit, 1973 case; United States  
16 against Mapp, 476 F 2d 67, also a Second Circuit  
17 1973 case.

18 Accordingly, the Court concludes that the  
19 Government has met its burden, and shown by clear  
20 and convincing evidence that Faruolo's consent to  
21 the search was freely and voluntarily given.

22 One final point, upon the authority of United  
23 States against Carneglia, 468 F 2d 1084, a Second  
24 Circuit 1972 case, and United States against  
25 Comissiong, 429 F 2d 834, Second Circuit, 1970, the

1  
2 Court rules that the request for the identities of  
3 the informants must be denied. Evidence has clearly  
4 been adduced in this pre-trial hearing, constituting  
5 a sufficient voucher against fabrication. Carneglia  
6 468 F 2d at 1080, citing Commissiong, 429 F 2d at  
7 839.

8 The motion to suppress, as I said earlier  
9 today, by Faruolo with respect to the evidence  
10 obtained by the FBI as a result of the consent to  
11 search, must be denied.

12 MR. WASHOR: May I address the Court, your  
13 Honor?

14 THE COURT: Yes.

15 MR. WASHOR: It is not appropriate to comment  
16 on a decision, we are bound by it. I guess we don't  
17 have to take exceptions to the ruling. I would now  
18 request the Court to advise counsel on an application  
19 that I intend to make -- well, let me make it first  
20 so you know what I am talking about. I would request  
21 that the Court permit a jury during the course of a  
22 trial, to make a factual determination on the issue  
23 of consent.

24 I would ask you to rule upon that issue prior  
25 to us commencing the trial, so that you will be apprised



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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U. S. DISTRICT COURT E.D. N.Y.

★ NOV 14 1973 ★

UNITED STATES OF AMERICA

TIME A.M. ....  
P.M. ....

-against-

72 CR 1334

JOHN JOSEPH PASTORE, et al.,

Defendants.

MEMORANDUM

At the conclusion of the hearing of the motions to suppress, the court ruled that the defendant Faruolo's confession was admissible, deferring a statement of its underlying findings and conclusions. The following constitutes the court's findings and conclusions on this point.

At the outset it should be noted that defendant Faruolo, while challenging the admissibility of his post-arrest statements, flatly insisted on not testifying as to the immediate circumstances in which those admissions were made. He relies again on his testimony as to the circumstances surrounding his earlier consent to a search.

The court finds:

(26)

(1) Agent Steadman had a conversation with Faruolo in the latter's living room on the afternoon of August 14, 1972 at approximately 5:00 p.m. This conversation occurred subsequent to the conversation in the back yard (which took place between 3:30 and 4:00 p.m.) regarding Faruolo's consent to the search of his house.

(2) Steadman and Faruolo were the only ones present in the living room, although another agent, Agent Strand, was in the room at various intervals during the interview.

(3) Agent Steadman, after introducing himself to Faruolo, advised him of his Miranda rights, reading in its entirety an advice of rights form. Faruolo read the form.

(4) While Steadman could not recall whether he had read a section of the form containing a waiver of rights, he did ask Faruolo whether he would waive his rights. Faruolo said that he would.

(5) Steadman asked him whether he would sign the form. Faruolo declined to do so.



(6) However, Faruolo then stated to Steadman that he would talk to him.

(7) After making certain statements to Steadman, Faruolo said that before answering any further questions, he wished to consult his attorney.

(8) The conversation between Steadman and Faruolo ended at that time.

(9) Faruolo was not under the influence of drugs or narcotics or under any other disability on August 14.

(10) Faruolo was treated at all times, in his own words, "nicely" and "fairly." He was not subjected to mental or physical abuse.

The court concludes that Faruolo was fully advised of his constitutional rights to remain silent and to counsel, and that he understood the warnings given. There is no evidence that he did not understand his rights. The fact that Faruolo, in the course of his interview with Steadman, did request the assistance of counsel prior to making any further statements, affirmatively supports this conclusion.

The court finds that he orally waived his rights fully and freely despite his refusal to sign the waiver of rights form. Faruolo having declined to testify as to his admissions, the court cannot endeavor to affix a reason for his refusal to sign the waiver. Parenthetically, the court notes that Faruolo's refusal to sign the waiver was viewed as having little if any probative weight as to the voluntariness of his consent to the search, particularly since Faruolo orally waived his rights anyway.

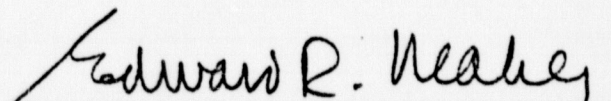
The basic thrust of Faruolo's attack on the admissibility of his statements to Agent Steadman relates to his prior consent to search and surrounding circumstances. The court has already found the consent to search to have been voluntary. Any contention that his statements are inadmissible due to the invalidity of that consent must be rejected.

Further, the court finds that irrespective of the validity of the consent, the statements were made voluntarily. They were preceded by warnings of Faruolo's Miranda rights for a second time, made in the absence of any actual or implied coercion. A substantial period of time intervened between Faruolo's consent to search and



his consent to answer questions, and, hence, any lingering coercive effects (the existence of which the court rejected ab initio) of Agent Edwards' drawn gun in the course of Faruolo's arrest would have been dissipated. Faruolo's refusal to sign the waiver form indicates that at the time he orally waived his rights, he was not submitting to authority.

And aside from the claimed residuary effects of the gun, there is no basis for challenging the admissibility of Faruolo's statements. They were voluntarily made after complete Miranda warnings, which he clearly understood.

  
U. S. D. J.

Dated: Brooklyn, N.Y.  
November 14, 1973

Certificate of Service

May 7, 1974

I certify that a copy of this brief and appendix has been mailed to the Acting United States Attorney for the Eastern District of New York.

William Epstein